Lee Lay Kin (trading as Simon Beading & Machinery Enterprise) v Foo Wan Yung

HIGH COURT (PENANG) — CIVIL APPEAL NO PA-22NCC-30–11 OF 2020
KENNETH ST JAMES JC
11 MARCH 2022

Civil Procedure — Striking out — Application for — Defendant was director of company — Company failed to pay judgment debt to plaintiff — Plaintiff filed action against defendant pursuant to s 540(1) of Companies Act 2016 — Defendant applied to strike out plaintiff's action pursuant to O 18 r 19 of Rules of Court 2012 — Whether court ought to strike out plaintiff's action on ground that there was no privity of contract and that company was separate legal entity — Whether plaintiff's action barred by res judicata and issue estoppel — Companies Act 2016 s 540(1) — Rules of Court 2012 O 18 r 19

The plaintiff had leased a plastering machine to a company ('the company') to which the defendant was the director. Due to the failure of the company to fully pay for the machine, the plaintiff had entered judgment in default ('the JID') for RM76,000 against the company ('the first suit'). Despite the JID, the company still failed to pay the judgment debt. Consequently, the plaintiff filed the second suit against the defendant pursuant to s 540(1) of the Companies Act 2016 ('the CA 2016'). The plaintiff contended that it was the defendant as the sole director of the company who caused the company to do business in such a way as to defraud its creditors, as such, the defendant should personally pay the company's debt. In response, the defendant had filed an application to strike out the second suit under O 18 r 19 of the Rules of Court 2012 ('the ROC'). The defendant submitted that: (a) there was no privity of contract between the plaintiff and the defendant; (b) the company was a separate legal entity; and (c) the second suit was barred by res judicata and issue estoppel.

Held, dismissing the defendant's striking out application with costs to follow the event:

(1) It was true that in the first suit, the plaintiff pleaded that it was the company that contracted with the plaintiff, and that the debt was owed by the company. However, the second suit against the defendant was not a claim under contract. It was a claim under a cause of action that was created by statute ie sub-s 540(1) of the CA 2016. The cause of action in the second suit was independent of the contractual claim in the first suit. The court was not persuaded to summarily strike out the second suit on

the ground that there was no privity of contract between the plaintiff and the defendant. Nor on the ground that the company was a separate legal entity (see paras 9–11).

(2) Res judicata and issue estoppel did not apply in the second suit. Not all facts in the first suit and the second suit were the same. The facts about the conduct of the defendant, as the sole director of the company, and to what extent he might have been involved in the manner in which the company did its business — were not present in the first suit. Further, the sub-s 540(1) cause was premised on different facts and the issues were also different. Analysing and applying the principles of res judicata and issue estoppel in the present striking out proceeding, the court was mindful not to summarily eliminate other subjects of litigation between the parties. For these reasons, the court was not persuaded to summarily strike out the second suit on the ground of res judicata or issue estoppel (see paras 13–18).

(3) The court was guided and bound by the propositions propounded by the Court of Appeal in *Lama Tile (Timur) Sdn Bhd v Lim Meng Kwang & Anor* [2015] 4 MLJ 85. The court therefore held that the plaintiff should be given the opportunity to prove his sub-s 540(1) claim against the defendant in a trial. Just the same as the defendant would have the opportunity to defend against the claim in a trial (see paras 19 & 25).

(4) The court applied the principles propounded in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 and found that the second suit was not a 'plain and obvious' case to use the summary procedure under O 18 r 19 of the ROC to strike out the plaintiff's statement of claim. Further, on reading of the pleadings, the court did not find that the plaintiff's claim was 'obviously unsustainable' (see paras 26–27).

[Bahasa Malaysia summary

Plaintif telah memajakkan mesin melepa kepada sebuah syarikat ('syarikat tersebut') di mana defendan adalah pengarahnya. Disebabkan kegagalan syarikat tersebut membayar sepenuhnya bayaran bagi mesin tersebut, plaintif telah memasukkan penghakiman ingkar ('PK') bagi jumlah RM76,000 terhadap syarikat tersebut ('saman pertama'). Walaupun PK telah dimasukkan, syarikat tersebut masih gagal membayar hutang penghakiman. Akibatnya, plaintif memfailkan saman kedua terhadap defendan menurut s 540(1) Akta Syarikat 2016 ('AS 2016'). Plaintif berhujah bahawa defendan sebagai pengarah tunggal syarikat tersebut yang telah menyebabkan syarikat tersebut menjalankan perniagaan sedemikian rupa untuk menipu pemiutangnya, oleh itu, defendan harus membayar sendiri hutang syarikat tersebut. Sebagai tindak balas, defendan telah memfailkan permohonan untuk membatalkan saman kedua di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 ('KKM').

A Defendan menghujahkan bahawa: (a) tidak terdapat priviti kontrak antara plaintif dan defendan; (b) syarikat tersebut ialah entiti undang-undang yang berasingan; dan (c) saman kedua telah dihalang oleh res judicata dan estoppel isu.

B **Diputuskan**, menolak permohonan pembatalan oleh defendan dengan kos mengikut keadaan:

(1) Memang benar bahawa dalam saman pertama, plaintif memplidkan bahawa syarikat tersebut yang memasuki kontrak dengan plaintif, dan hutang tersebut terhutang oleh syarikat. Bagaimanapun, saman kedua terhadap defendan bukanlah tuntutan di bawah kontrak. Ia adalah tuntutan di bawah kausa tindakan yang diwujudkan oleh statut iaitu sub-s 540(1) AS 2016. Kausa tindakan dalam saman kedua adalah bebas daripada tuntutan kontrak dalam saman pertama. Mahkamah tidak terpujuk untuk membatalkan saman kedua secara ringkas atas alasan bahawa tidak ada priviti kontrak antara plaintif dan defendan. Juga atas alasan bahawa syarikat tersebut adalah entiti undang-undang yang berasingan (lihat perenggan 9–11).

(2) Res judicata dan estoppel isu tidak terpakai dalam saman kedua. Tidak semua fakta dalam saman pertama dan saman kedua adalah sama. Fakta tentang kelakuan defendan, sebagai pengarah tunggal syarikat tersebut, dan sejauh mana dia mungkin terlibat dalam cara syarikat tersebut menjalankan perniagaannya — tidak terdapat dalam saman pertama. Selanjutnya, kausa sub-s 540(1) adalah berdasarkan fakta yang berbeza dan isunya juga berbeza. Menganalisis dan menggunakan prinsip res judicata dan estoppel isu dalam prosiding pembatalan semasa, mahkamah beringat untuk tidak menghapuskan secara ringkas subjek litigasi lain di antara pihak-pihak. Atas alasan-alasan ini, mahkamah tidak terpujuk untuk membatalkan saman kedua secara ringkas atas alasan res judicata atau estoppel isu (lihat perenggan 13–18).

(3) Mahkamah berpandukan dan terikat dengan dalil yang dikemukakan oleh Mahkamah Rayuan di dalam kes *Lama Tile (Timur) Sdn Bhd v Lim Meng Kwang & Anor* [2015] 4 MLJ 85. Oleh itu mahkamah memutuskan bahawa plaintif harus diberi peluang untuk membuktikan tuntutannya di bawah sub-s 540(1) terhadap defendan dalam perbicaraan. Sama seperti defendan berpeluang membela dirinya daripada tuntutan tersebut dalam perbicaraan (lihat perenggan 19 & 25).

(4) Mahkamah menggunakan prinsip yang dikemukakan dalam *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 dan mendapati saman kedua bukanlah kes yang 'plain and obvious' untuk menggunakan prosedur ringkasan di bawah A 18 k 19 KKM untuk membatalkan pernyataan tuntutan plaintif. Selanjutnya, setelah membaca pliding, mahkamah tidak mendapati

bahawa tuntutan plaintif adalah 'obviously unsustainable' (lihat perenggan 26–27).]

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)
Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (folld)
Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd [2016] 3 MLJ 122, CA (folld)
Double Acres Sdn Bhd v Tiarasetia Sdn Bhd [2007] MLJU 477, HC (refd)
Lama Tile (Timur) Sdn Bhd v Lim Meng Kwang & Anor [2015] 4 MLJ 85, CA (folld)
North West Water Ltd v Binnie & Partners (a firm) [1990] 3 All ER 547, QBD (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 304(1)
Companies Act 2016 s 540, 540(1)
Rules of Court 2012 O 18 r 19

Razeena Rahumathullah (Lucas Khaw Yee Kang with her) (Lim, Ho, Cheong & Lok) for the applicant.
Lim Tien Loong (P Marcus with him) (Lim & Chia) for the respondent.

Kenneth St James JC:

PROLEGOMENON

[1] This suit is about sub-s 540(1) of the Companies Act 2016. Section 540 sets out that if, in a proceeding against a company, it appears that the company was conducting business with an intent to defraud its creditors, the court can declare any person who was knowingly a party to the fraudulent manner in which the company was conducting its business, to be personally liable for the debts of the company. The court can make such a declaration against that person.

[2] These are the terms of s 540(1):

> Section 540 Responsibility for fraudulent trading
>
> (1) If in the course of the winding up of a company or in any proceedings against a company it appears that *any business of the company has been carried on with intent to defraud the creditors of the company* or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company, may, if the Court thinks proper so to do, declare that

A *any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible*, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs. (Emphasis added.)

KEY FACTS

B

[3] This suit is the sequel to the dispute between the parties. In an earlier suit, the plaintiff sued the company ('first suit'). The first suit was for a debt of approximately RM76,000. The plaintiff leased plastering machines to the company. The company did not fully pay for the machines.

C

[4] The plaintiff entered a judgment in default against the company. The company refused to pay the judgment debt.

D **[5]** The defendant was the sole director of the company. The plaintiff asserts that it was the defendant who caused the company to do business in such a way as to defraud its creditors. And so the defendant should personally pay the company's debt.

E **[6]** This suit is a later suit ('second suit'). Although this second suit is based on sub-s 540(1), much of the relevant facts relate back to the first suit — how the company transacted with the plaintiff for the machines, and later refused to pay.

F THE APPLICATION TO STRIKE OUT

[7] The defendant applied to strike out this second suit under O 18 r 19 of the Rules of Court 2012. Should this second suit be struck out? These are the key issues that were canvassed.

G

PRIVITY OF CONTRACT

[8] The defendant argued that as he is a *director* of the company, he cannot be made liable for the company's breach of its transactional contract with the

H plaintiff. The company is a separate legal entity. And the defendant was not privy to the contract. The defendant cites *Double Acres Sdn Bhd v Tiarasetia Sdn Bhd* [2007] MLJU 477 (HC) as authority for this well-settled principle.

I **[9]** Indeed, in the first suit, the plaintiff pleaded that it was the *company* that contracted with the plaintiff, and that the debt was owed by the company.

[10] But this second suit against the defendant is not a claim under contract. It is a claim under a cause of action that is created by statute — sub-s 540(1).

The cause of action in this second suit is independent of the contractual claim in the first suit.

[11] I am not persuaded to summarily strike out the second suit on the ground that there was no privity of contract between the plaintiff and the defendant. Nor on the ground that the company is a separate legal entity.

RES JUDICATA AND ISSUE ESTOPPEL

[12] The doctrine of res judicata and issue estoppel dictate that in a dispute between parties, the issues that were raised and decided in an earlier suit cannot be raised again in a later suit. The policy behind this is that 'it is in the public interest that there should be finality in litigation', and 'no one should be vexed twice for the same cause of action': *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 (SC) at 197.

[13] I am, however, of the view that res judicata and issue estoppel do not apply in the second suit — not in the context of this summary proceeding to strike out.

[14] Not all the facts in the first suit and this second suit are the same. Only the facts about the company's transaction with the plaintiff are the same. The facts about the *conduct* of the defendant, as the sole director of the company, and to what extent he may have been involved in the manner in which the company did its business — were not present in the first suit.

[15] The plaintiff's claim in this second suit is in a statutory tort. It is about the conduct of the defendant — whether he was knowingly involved in the way the company did its business with the plaintiff; whether the company conducted its business with the plaintiff with an intent to defraud the plaintiff. This s 540(1) cause is premised on different facts.

[16] The issues too are different.

[17] Analysing and applying the principles of res judicata and issue estoppel in this striking out proceeding, I am mindful *not to summarily eliminate other subjects of litigation* between the parties. I am guided by the judgment of the Court of Appeal in *Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd* [2016] 3 MLJ 122 (CA) at para [24], where the court referred to the reasoning of Drake J in *North West Water Ltd v Binnie & Partners (a firm)* [1990] 3 All ER 547:

> [24] In *North West Water Ltd v Binnie & Partners (a firm)*, three defendants namely the consultant engineers, the water authority and the contractors were sued for

negligence but only the consultant engineers were wholly found to be negligent. In subsequent separate proceedings where the water authority issued proceedings against the consultant engineers based on contract and negligence to recover damages, the court stated that consideration of the authorities reveal two schools of thought on the issue of the limits which should be put on the application of the doctrine of estoppel. One approach was called the broad one which held that the true test of an issue estoppel was whether for all practical purposes the party seeking to put forward some issue had already had that issue determined against him by a court of competent jurisdiction, even if the parties to the two actions were different. The conflicting approach was to confine issue estoppel to that species of estoppel *per rem judicatam* that may arise in civil actions between the same parties or their privies. Drake J in preferring the broader approach to a plea of issue estoppel said:

> In my judgment, this broader approach to a plea of issue estopple [sic] is to be preferred. I find it unreal to hold that the issues raised in two actions arising from identical facts are different solely because the parties are different or because the duty of care owed to different persons is in law different. However, I at once stress my use of the word 'solely'. I think that *great caution must be exercised before shutting out a party from putting forward his case on the grounds of issue estoppel* or abuse of process. Before doing so *the court should be quite satisfied that there is no real or practical difference between the issues to be litigated in the new action and that already decided, and the evidence which may properly be called on those issues in the new action.* (Emphasis added.)

[18] I will also not persuaded to summarily strike out the plaintiff's second suit on the ground of res judicata or issue estoppel.

LAMA TILE AUTHORITY

[19] Further, I am both guided and bound by the propositions propounded by the Court of Appeal in *Lama Tile (Timur) Sdn Bhd v Lim Meng Kwang & Anor* [2015] 4 MLJ 85. This was an appeal where the respondents (defendants in the High Court) were the common directors of two companies: LMK and SLMK. LMK purchased building materials from the appellant (plaintiff): Lama Tile. The materials were delivered and received. LMK did not pay for the materials. Lama Tile sued LMK, and got judgment against LMK. LMK did not pay the judgment debt either.

[20] Before suing, Lama Tile issued a letter of demand to LMK. When LMK received the letter of demand, LMK changed its signboard to **S**LMK. But it continued to use the same premises, the same telephone and fax numbers, and the same logo to identify its business.

[21] SLMK was a dormant company.

[22] Lama Tile filed another suit — this time against the respondents (the

directors), under sub-s 304(1) of the previous Companies Act 1965. Section 304(1) is the equivalent of the present sub-s 540(1).

[23] The High Court dismissed the claim. One of the High Court's grounds was that res judicata applied to the latter suit. Lama Tile appealed to the Court of Appeal.

[24] This is what the Court of Appeal said on the issue of res judicata:

> [22] A reading of these paragraphs will show clearly the High Court had fundamentally misconstrued the appellant's pleaded case, leading to a major error requiring our appellate intervention. Thus, if the learned trial judge had properly directed his mind to the actual pleaded case, we believe His Lordship would not have so readily concluded that the action was premature, or that it was subject to res judicata. Whether or not the action was premature depended on a combination of relevant facts in light of s 304 of the Act.
>
> [24] On the facts of this appeal, *there was no real issue of res judicata, since the s 304 action is based on a specific and different cause of action provided under company legislation*. It is *not based on recovery for debt per se, but on the personal liability of the persons involved in the fraudulent course of carrying on the business of the company to avoid paying creditors.* One cannot reasonably conclude that reading the pleaded claim against the directors/shareholders with precision, it is the same or similar with the previous claim against the company. *Section 304 deals with dishonest conduct involving real moral blame according to current notions of fair trading among commercial men* (*Siow Yoon Keong v H Rosen Engineering BV* [2003] 4 MLJ 569; [2003] 4 CLJ 68).
>
> [27] Reverting to the issue of the claim being premature, this was an issue without merit. There was obviously no doubt that the earlier judgment was pronounced in court, and it would have force and validity as of that date of pronouncement. Equally obvious, if the appellant was minded to enforce that judgment against the company, it would have to extract the sealed judgment and serve on LMK Edaran, now masquerading as SLMK Edaran, but the appellant has also elected to proceed against the respondents under *s 304*. That *is an independent cause of action founded on morally blameworthy conduct on their part that law and policy should not leave unremedied among commercial men*. It will create an undesirable precedent if this type of conduct is not corrected by the courts.

[25] I hold that the plaintiff should be given the opportunity to prove his sub-s 540(1) claim against the defendant in a trial. Just the same as the defendant will have the opportunity to defend against the claim in a trial.

CONCLUSION

[26] In summation, applying the principles propounded in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, I find that this second suit is not a 'plain and obvious' case to use the summary

A procedure under O 18 r 19 to strike out the plaintiff's statement of claim.

[27] Nor do I find, on reading the pleadings, that the plaintiff's claim is 'obviously unsustainable'.

B **[28]** On these grounds, I dismiss the defendant's striking out application with costs to follow the event (which I intend to mean that the party who succeeds after the trial will get the costs of this proceeding too).

Defendant's striking out application dismissed with costs to follow the event.

C

Reported by Dzulqarnain Ab Fatar

D

E

F

G

H

I